

Essential Needs for Companies Exporting from the U.S.: An Export Compliance Program and Due Diligence—BIS and Others Are Watching

By Christopher M. Kane and Adonica-Jo R. Wada

In today's rapidly expanding global economy, we are witness to an international arena that has no bounds, yet is tempered by concerns for national security. As businesses streamline their processes and develop innovative ways to tap new markets, having an export compliance program is not only important, but necessary.

Senior level management and executives need to set the tone for the company in making a corporate commitment to compliance with U.S. export laws. Setting forth this level of commitment requires the establishment of the basic principles of business conduct expected of the company and its employees, creating a culture of compliance.

The benefits of having an export compliance program are real. First, exporting is a privilege. If companies do not comply with U.S. and/or a host country's export controls, companies run the risk of being assessed severe administrative and criminal penalties, including the complete denial of all export privileges. Although a company may be able to satisfy a civil penalty, the subsequent damage to the company's public image may be irreparable.

Understanding how your company conducts business is key to the development of any efficient and effective export compliance program. What is being exported? Where is it being exported? Who are your customers? How will the product be used? Besides the Bureau of Industry & Security ("BIS"), what other governmental agencies may have jurisdiction over what the company is exporting and where it is being shipped? What are the form, fit and function of the exported item?

It is important to note that U.S. export regulations do not simply deal only with products and commodities shipped from the United States to a foreign country. A company must examine whether technology can be released to a foreign national, even if the foreign national is in the United States. The release of technology can be as innocuous as it just sitting on a desk where people can easily pass by or a telephone conversation in which information is exchanged. If a foreign national has access to such technology, it is considered an export—a "deemed" export—to the home country or countries of the foreign national and may well require a license.

An export compliance program is no longer "voluntary" or "optional." Companies not only must understand how they conduct business but, when acquiring other businesses, they must perform due diligence in scrutinizing and understanding the export control practices of the company they plan to acquire. Companies can and will be held liable for violations of the Export Administration Regulations

committed by companies they acquire. Performing due diligence may reveal skeletons in the closet. However, due diligence in advance of a purchase of an exporting company can protect the acquiring company, and it may also provide an opportunity to negotiate more favorable terms if issues and concerns regarding export practices are discovered.

The number of investigations, enforcement cases, and assessments of penalties, both administrative and criminal, have increased over the years and will continue to rise. The Bureau of Industry and Security, along with other U.S. federal agencies, looks to enable legitimate trade while preventing suspect transactions. An effective export compliance program will help distinguish the two.

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Christopher M. Kane is a partner in the law firm Simon Gluck & Kane LLP. He is a member of the New York Bar and is admitted to practice before the Court of Appeals for the Federal Circuit, U.S. District Court in the Southern and Eastern Districts of New York and the U.S. Court of International Trade. Mr. Kane graduated from Adelphi University (B.A., 1974), State University of New York (S.U.N.Y.) Maritime College (M.S., 1978), and New York Law School (J.D., 1982). He was employed at the Federal Maritime Commission for more than fifteen years, during which time he served as Senior Investigator, as well as Acting Director in the New York and Miami Districts, and Hearing Counsel at the agency's Washington, D.C. Headquarters.

Mr. Kane is experienced in the areas of ocean transportation and compliance audit procedures for licensed ocean freight forwarders, NVOCCs, shippers/consignees, and service contracts. He has served as Counsel to the Association of Steamship Advertising & Promotion and as a member of the faculty of S.U.N.Y. Maritime College, where he taught the subject of Transportation Law at the graduate level. He has lectured at the Port Authority of New York/New Jersey on transportation-related topics, and has spoken at the Annual Meeting of the American Association of Exporters and Importers on the topic of Customs Reconciliation Entry Procedures. In addition to practice before U.S. Customs, the FMC, and the Commerce Department, Mr. Kane has represented clients in matters involving the Environmental Protection Agency, Food & Drug Administration, U.S. Postal Service, Surface Transportation Board, U.S. Trade Representative, Federal Trade Commission, International Trade Commission, Department of Agriculture, Consumer Product Safety Commission, Fish & Wildlife Service, and the Patent & Trademark Office.

He has been a member of the Maritime Bar Association and Customs and International Trade Bar Association. Mr. Kane also holds a license as a Customs broker.

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Adonica-Jo R. Wada is a member of the California and Washington State Bars. She is admitted to practice before the U.S. District Court for the Northern District of California, the U.S. Court of Appeals

for the Federal Circuit and the U.S. Court of International Trade. Ms. Wada is a 1990 graduate of Western Washington University. She received a Juris Doctor degree from Chicago-Kent College of Law in 1993. From 1993-1995, Ms. Wada served as a Judicial Law Clerk to the Hon. Charles Z. Smith, Washington State Supreme Court.

Ms. Wada's practice is focused in Customs and International Trade Law and in representing companies involving a wide range of import and export related matters pertaining to U.S. Customs and Border Protection including: valuation; classification; country of origin; customs fraud; penalties and forfeitures; trademark and copyright infringement; and broker compliance matters. Ms. Wada has also represented the interests of surety companies that underwrite customs bonds submitted by importers upon entry of merchandise into the United States.

In addition to practice before U.S. Customs and Border Protection, Ms. Wada also handles customs related matters that involve regulations from other federal agencies, including the Department of Commerce, the Department of Transportation, the Food & Drug Administration, the U.S. Trade Commission, International Trade Commission, the Environmental Protection Agency, the Consumer Product Safety Commission and the Patent & Trademark Office.

Ms. Wada is a member of the American Bar Association, the American Association of Exporters and Importers (AAEI), the International Compliance Professionals Association and is a member of the Board of Directors of Women in International Trade-Northern California (WIT-NC).